Filed 8/5/15 In re N.B. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re N.B., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. J.W., Defendant and Appellant.	E062753 (Super.Ct.No. SWJ1300896) OPINION

APPEAL from the Superior Court of Riverside County. Lawrence P. Best, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed with directions.

Michele Anne Cella, under appointment by the Court of Appeal, for Defendant and Appellant.

Gregory P. Priamos, County Counsel, Anna M. Marchand, Deputy County Counsel, for Plaintiff and Respondent.

J.W. (mother) appeals from an order pursuant to section 366.26 of the Welfare and Institutions Code,[1] terminating her parental rights to her daughter, N.B. Mother contends: (1) the juvenile court abused its discretion by denying her petition under section 388 to reinstate reunification services; and (2) the juvenile court erred by finding the Riverside County Department of Public Social Services (DPSS) gave sufficient notice to named Indian tribes of N.B.'s possible Indian heritage, as mandated by the Indian Child Welfare Act of 1978 (ICWA). (25 U.S.C. § 1901 et seq.)

We conclude the juvenile court properly denied mother's modification petition because she did not demonstrate changed circumstances warranting reinstatement of reunification services or that reinstatement would be in N.B.'s best interest. However, we agree with mother that DPSS did not include sufficient information in its ICWA notice and the trial court erred by concluding the notice was sufficient. We also conclude the deficiency in the ICWA notice was not harmless because on this record we cannot say the named Indian tribes would not have found N.B. to be an Indian child had the notice been sufficient. Therefore, we conditionally reverse the order terminating mother's parental rights and remand for the limited purpose of directing DPSS to provide new ICWA notice and for the juvenile court to determine whether that notice is sufficient.

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[1] Unless otherwise indicated, all additional undesignated statutory references are to the Welfare and Institutions Code.

I.

FACTS AND PROCEDURAL BACKGROUND

Mother tested positive for methamphetamine after giving birth to N.B. Mother admitted to hospital staff that she used methamphetamine during her pregnancy, but she then changed her story and claimed her positive drug test was the result of exposure to secondhand methamphetamine smoke from N.B.'s father,[2] who was an addict. Mother told a social worker that she met N.B.'s father when she was already addicted to methamphetamine, and they used the drug together for a year and a half before N.B.'s birth. Mother also told the social worker that she had previously been arrested for possession of a controlled substance and was ordered to complete a 15-day outpatient program, but that mother did not complete the program and was waiting until after she gave birth before considering a treatment plan. Mother and father told the social worker they were transient and had been "couch surfing" just prior to N.B.'s birth. When the social worker offered mother the opportunity to enter an inpatient drug rehabilitation program, she declined, stating she was uncomfortable in such a controlled environment because it would feel like being in jail.

[2] N.B.'s father did not file a notice of appeal and made no appearance in this court.

Mother requested that N.B. be placed with a relative, but DPSS could not locate a suitable relative for placement. N.B. was transferred to a neonatal intensive care unit for respiratory distress, and later tested positive for methamphetamine and amphetamine. After mother was released, she did not visit N.B. in the hospital.

In a dependency petition, DPSS alleged that N.B. suffered or was at risk of suffering serious physical harm or illness due to mother's failure or inability to adequately care for N.B., and that the neglect was the result of mother's use of methamphetamine during her pregnancy and her transient lifestyle. In a companion detention report, DPSS recommended that the juvenile court order N.B. detained in the custody of DPSS, and that the parents be given visitation and offered drug treatment, counseling, and parenting classes. The juvenile court found a prima facie case that N.B. was a dependent child within the meaning of section 300, subdivision (b), and ordered N.B. detained and placed in the custody of DPSS.

N.B. was discharged from the hospital two weeks after her birth, and was placed in the home of her prospective adoptive family. In a report for the jurisdictional/ dispositional hearing, DPSS reported that mother's whereabouts were unknown, and that she and father were apparently living as transients in Cathedral City. The social worker also reported that mother failed to appear for appointments at DPSS's office and for intake appointments at drug rehabilitation and parenting programs, and that she believed mother was still using methamphetamine. Because it could not locate or maintain regular contact with the parents, and mother continued to live a transient lifestyle and abuse methamphetamine, DPSS filed an amended petition alleging N.B. was left with no

provision for support, pursuant to section 300, subdivision (g), and recommended the juvenile court adjudge N.B. to be a dependent child.

In an addendum report, DPSS informed the juvenile court that N.B.'s parents had not made any progress in their case plans, and continued to use methamphetamine and live as transients. The parents also failed to regularly visit N.B., and mother made no inquiries to DPSS about N.B.'s health or status. At the jurisdictional hearing, the juvenile court found true the allegations of neglect based on the parents' drug use, struck the allegations based on the parents' transient lifestyle and the allegations of failure to provide support, and adjudged N.B. to be a dependent child.

N.B.'s caregivers requested that the juvenile court declare them to be de facto parents. They reported that N.B. had adjusted well to her foster home, had bonded with her caregivers, and that N.B.'s parents had not once visited her. The juvenile court granted the request.

In a status review report, DPSS reported that, since the jurisdictional hearing, N.B.'s parents still had not made any progress in their case plans and failed to regularly visit N.B. DPSS also reported that N.B. was developing well and bonding with her caregivers, and that her caregivers expressed their desire to adopt N.B. Therefore, DPSS recommended that reunification services be terminated and that the juvenile court set a hearing pursuant to section 366.26 for termination of parental rights and selection of a permanent plan.

In an addendum report, DPSS reported that on July 22, 2014, eight months after N.B. was born, mother had her first supervised visit with N.B. in the caregiver's home. At that time, mother informed the social worker that she was no longer residing with N.B.'s father. DPSS reported that N.B. was uncomfortable with mother and cried during that and subsequent visits and that mother appeared to lack knowledge about how to hold, comfort, or change a baby. DPSS also reported that mother had recently enrolled in an inpatient drug rehabilitation program and tested negative for illegal drugs, but that mother had not yet enrolled in a parenting program. DPSS continued to recommend that reunification services be terminated and that the juvenile court set a hearing pursuant to section 366.26.

At a contested status review hearing, mother testified that she had completed a 90-day inpatient drug treatment program, tested negative for drugs, was enrolled in an outpatient program and had a sponsor, and as of that date she had been sober for 126 days. Mother also testified that she started visiting N.B. regularly, and that she was enrolled in parenting classes. She testified that N.B. seemed to know who mother was, and that the two were bonding. On cross-examination, mother testified that, prior to entering the inpatient drug treatment program, she was still actively abusing methamphetamine. After hearing the arguments of counsel, the juvenile court found it was not substantially probable that N.B. would be returned to mother if mother was afforded an additional six months of reunification services, and the court terminated those services and set a hearing pursuant to section 366.26.

Mother petitioned the juvenile court to reinstate reunification services, contending her success in the inpatient drug rehabilitation program and continued sobriety were a changed circumstance warranting relief and that reinstatement would be in N.B.'s best interest. The juvenile court set the petition for a hearing. At the hearing, counsel for DPSS argued mother's sobriety was "still very much in progress" and did not constitute a changed circumstance for purposes of section 388. Counsel also argued that reinstatement of reunification services would not be in N.B.'s best interest because mother had no pre-existing relationship with the child and further reunification services would not "serve the child's permanency or stability." The juvenile court noted that mother's completion of a 90-day drug treatment program occurred before reunification services were terminated and, therefore, did not constitute a changed circumstance, and that reinstatement of reunification services would not be in N.B.'s best interest. The court denied the petition.

At the section 366.26 hearing, the juvenile court found N.B. was likely to be adopted and terminated mother and father's parental rights. Mother timely appealed.

II.

DISCUSSION

A. *The Juvenile Court Did Not Abuse Its Discretion by Denying Mother's Petition to Reinstate Reunification Services.*

Mother contends the juvenile court abused its discretion by denying her modification petition because she had "fully recovered from her addiction" and had been sober for seven months when she filed her petition, she obtained employment, and

reinstatement would be in N.B.'s best interest because she was bonding with mother. Mother's progress and short-lived sobriety, though commendable, did not entitle her to a reinstatement of reunification services. Moreover, the juvenile court accurately concluded that reinstatement of reunification services would not be in N.B.'s best interest.

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] The parent bears the burden to show both a legitimate change of circumstances and that undoing the prior order would be in the best interest of the child. [Citation.] Generally, the petitioner must show by a preponderance of the evidence that the child's welfare requires the modification sought. [Citation.]" (*In re A.A.* (2012) 203 Cal.App.4th 597, 611-612 [Fourth Dist., Div. Two].)

"A petition for modification is 'committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established. [Citations.]' [Citations.] ' . . . "['] The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" [Citation.]'" (*In re A.R.* (2015) 235 Cal.App.4th 1102, 1116-1117.)

"Not every change in circumstance can justify modification of a prior order. [Citation.] The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate. [Citations.] In other words, the problem that initially brought the child within the dependency system must be removed or ameliorated. [Citations.] The change in circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged order. [Citations.]" (*In re A.A.*, *supra*, 203 Cal.App.4th at p. 612.)

Section 388 is "an 'escape mechanism' when parents *complete a reformation* in the short, final period after the termination of reunification services but before the actual termination of parental rights. [Citation.]" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528, italics added.) It is not enough for a parent to show an incomplete reformation or that she is in the process of changing the circumstances which lead to the dependency. "After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' [citation] . . . . A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) "'A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent . . . might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.] "'[C]hildhood

does not wait for the parent to become adequate.’’’’ [Citation.]” (*In re Mary G.* (2007) 151 Cal.App.4th 184, 206.)

The courts have consistently held that, when long-term drug addiction is the prime reason for a parent’s unfitness and of the dependency, it is not enough for the parent to show they have started the process of getting sober or that they have been sober for a brief period, especially when the record demonstrates the parent relapsed after earlier failed attempts at treatment and rehabilitation. (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 641-642; *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [Fourth Dist., Div. Two]; *In re Mary G.*, *supra*, 151 Cal.App.4th at p. 206; *In re Amber M.* (2002) 103 Cal.App.4th 681, 686-687; *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 423-424; *In re Casey D.* (1999) 70 Cal.App.4th 38, 48; *In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531, fn. 9.)

Mother admitted to having been addicted to methamphetamine when she met father, to having used methamphetamine for a year a half before N.B. was born, and that she had previously failed in a court-ordered rehabilitation program. Indeed, mother used methamphetamine while pregnant with N.B., and both she and N.B. tested positive for methamphetamine in the hospital. Mother declined the social worker’s offer of being placed in an inpatient treatment program, and continued to use methamphetamine until six months after N.B. was detained. At the time she filed her petition, mother had only been sober for seven months and was still participating in an outpatient rehabilitation program. Mother’s recent sobriety, while evidence of changing circumstances, was simply not a sufficient showing of *changed* circumstances.

Even if we were to conclude mother made a sufficient showing of changed circumstances, she did not demonstrate that reinstatement of reunification services would be in N.B.'s best interest. "'It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child. [Citation.]' [Citation.] The fact that the parent 'makes relatively last-minute (albeit genuine) changes' does not automatically tip the scale in the parent's favor. [Citation.] Instead, 'a number of factors should be examined.' [Citation.] First, the juvenile court should consider 'the seriousness of the reason for the dependency . . . .' [Citation.] 'A second important factor . . . is the strength of the existing bond between the parent and child . . . .' [Citation.] Finally, as 'the essence of a section 388 motion is that there has been a change of circumstances,' the court should consider 'the nature of the change, the ease by which the change could be brought about, and the reason the change was not made before . . . .' [Citation.] 'While the bond to the caretaker cannot be dispositive . . . , our Supreme Court made it very clear . . . that the disruption of an existing psychological bond between dependent children and their caretakers is an extremely important factor bearing on any section 388 motion.' [Citation.]" (*In re D.R.* (2011) 193 Cal.App.4th 1494, 1512.)

As with the changed circumstances analysis, the evidence of mother's commendable, though recent sobriety was not so substantial that no reasonable judge would have ruled the same way as the juvenile court did here. The seriousness of the reason for the dependency is undisputed—the parents were both drug users who failed to provide for N.B. and placed her at risk of physical harm. (See *In re D.R.*, *supra*, 193

Cal.App.4th at p. 1512.) Mother was in the process of changing those circumstances, but the record supports the juvenile court's finding that the circumstances had not changed sufficiently to alleviate the reasons for the dependency. And the fact that mother had previously failed to complete a drug treatment program and had relapsed, shows the difficulty of alleviating the reasons for the dependency and why they were not alleviated before. (*Ibid*.)

Finally, mother did not submit evidence of a sufficiently strong bond with N.B. that would warrant granting her petition. (*In re D.R.*, *supra*, 193 Cal.App.4th at p. 1512.) N.B. never lived with mother, and she failed to make any supervised visits with her daughter until eight months after her birth. Mother testified at the status review hearing that she read books to N.B., played with her, and sang to her. But there is no evidence in the record that N.B. had bonded with her mother.

In light of the foregoing, we conclude the juvenile court correctly denied mother's petition.

B. *The Failure of DPSS to Provide Sufficient Information in the ICWA Notice for the Named Indian Tribes to Determine Whether N.B. Is an Indian Child Was Not Harmless, and We Remand for the Limited Purpose of Providing New Notice.*

Mother contends the ICWA notice did not contain sufficient information for the relevant Indian tribes to determine whether N.B. was an Indian child, and the juvenile court erred by finding DPSS provided "good notice" pursuant to ICWA because DPSS did not include: (1) a copy of N.B.'s birth certificate; (2) mother's date and place of birth; (3) mother's former addresses; or (4) any information whatsoever about N.B.'s

maternal grandparents and great-grandparents. DPSS concedes the notice did not include pertinent information about mother and N.B.'s maternal grandparents and great-grandparents as required by law, but contends it was not required to submit a copy of N.B.'s birth certificate. Notwithstanding the omissions, DPSS argues the error was harmless. We conclude the error was not harmless and remand for the limited purpose of providing new ICWA notice.

1. Additional background

In the initial petition, DPSS indicated N.B. "may have Indian ancestry." The detention report also indicated that ICWA "does or may apply" to N.B. because mother reported her parents were "non-registered members of the Cherokee and Blackfoot Nation Tribes." The social worker notified the Bureau of Indian Affairs (BIA) of N.B.'s detention, and recommended that the juvenile court: (1) order mother and father to complete "Parental Notification of Indian Status" forms (ICWA-020); (2) find there is reason to believe N.B. is an Indian child; and (3) order DPSS to provide ICWA notice to the identified tribes and to the BIA. The juvenile court adopted these recommendations when it issued the detention order. In their ICWA-020 forms, father reported he has no known Indian ancestry, and mother again reported possible Blackfeet and Cherokee ancestry.

DPSS mailed an ICWA notice (form ICWA-030) to the BIA, the Blackfeet Tribe of Montana, and to various Cherokee tribes and tribal entities. The notice included N.B.'s and mother's names and dates of birth. Under the spaces provided for mother's former address and place of birth, the notice states, "Unknown." In the spaces provided

for information about mother's parents and grandparents (N.B.'s maternal grandparents and great-grandparents), the notice states: "No information available."

The first tribe to respond was the United Keetoowah Band of Cherokee Indians in Oklahoma. The tribe wrote that, using the information provided in the notice, it searched its enrollment records and found no evidence that N.B. descended from someone in the tribe's roll. In anticipation of the jurisdictional hearing, DPSS filed with the juvenile court its notice and the response letter from the United Keetoowah Band of Cherokee Indians in Oklahoma and requested that the juvenile court "find good ICWA notice." The juvenile court found that DPSS gave "good notice pursuant to ICWA," and that "ICWA does not apply to the United Keetoowah Band of Cherokee Indians."

One month after the jurisdictional hearing, DPSS filed with the juvenile court a response from the Blackfeet Tribe. The Blackfeet Tribe wrote it was unable to locate N.B.'s mother and father in its enrollment records and, therefore, it concluded N.B. is not an Indian child. A few days later, the juvenile court conducted a contested jurisdictional hearing on the first amended petition, and in its order the court again found that DPSS provided "good notice pursuant to ICWA."

Approximately six months later, DPSS filed in the juvenile court additional ICWA responses. In its responses, the Cherokee Nation reported that, "based on the information received from [DPSS]," it concluded N.B. was "neither registered nor eligible to register as a member of this tribe," and that N.B. was not an Indian child. The BIA also responded, acknowledging receipt of the notice.

At the contested status review hearing, at which time the juvenile court terminated mother's reunification services, the juvenile court made a finding that "[n]otice was given as required by law" and that "ICWA does not apply." Mother did not object to this finding.[3] Two months later, DPSS filed with the juvenile court an additional response from the Cherokee Nation. In that letter, the Cherokee Nation indicated it searched for N.B.'s and her parents' names in its tribal records and found that none of them were current enrolled members. Therefore, the tribe concluded N.B. was not an Indian child.

Finally, in its report for the section 366.26 hearing, DPSS recommended the juvenile court again find that N.B. was not an Indian child. The juvenile court found that notice was provided "as required by law," that N.B. was not an Indian child, and that ICWA does not apply. Once more, mother did not object to these findings.

2. Analysis.

"'Among ICWA's procedural safeguards is the duty to inquire into a dependent child's Indian heritage and to provide notice of the proceeding to any tribe or potential tribes, the parent, any Indian custodian of the child and, under some circumstances, to the Bureau of Indian Affairs.' [Citation.] To comply with these notice requirements, [DPSS] was required to (1) identify any possible tribal affiliations and send notice to those tribes; and (2) submit copies of such notices, including return receipts, and any correspondence received from the tribes to the trial court. [Citation.]" (*In re Christian P.* (2012) 208

[3] The record on appeal does not include a reporter's transcript from the jurisdictional hearing, and the minutes from that hearing do not indicate whether mother objected to the earlier finding of "good notice" under ICWA.

Cal.App.4th 437, 451.) "'The [trial] court must determine whether proper notice was given under ICWA and whether ICWA applies to the proceedings. [Citation.] We review the trial court's findings for substantial evidence. [Citations.]'" (*Ibid.*)

DPSS argues mother forfeited her challenge to the sufficiency of the ICWA notice because she did not object below and "allowed the juvenile court to treat [N.B.] as if she fell outside the definition of an Indian child." We disagree. "The generally accepted rule in dependency cases is that the forfeiture doctrine does not bar consideration of ICWA notice issues on appeal. [Citation.]" (*In re Alice M.* (2008) 161 Cal.App.4th 1189, 1195.) "ICWA notice issues cannot be forfeited for appeal by a parent's failure to raise them in the juvenile court, because it is the tribes' interest, not the parents', that is at stake in dependency proceedings that implicate ICWA. [Citations.]" (*In re A.G.* (2012) 204 Cal.App.4th 1390, 1400.) Therefore, we must address the merits of mother's argument.

"ICWA notice requirements are strictly construed. [Citation.] The notice sent to the BIA and/or Indian tribes must contain enough information to be meaningful. [Citation.] The notice must include: if known, (1) the Indian child's name, birthplace, and birth date; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) names and addresses of the child's parents, grandparents, great grandparents, and other identifying information; and (4) a copy of the dependency petition. [Citation.] To enable the juvenile court to review whether sufficient information was supplied, [DPSS] must file with the court the ICWA notice, return

receipts and responses received from the BIA and tribes. [Citation.]" (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.)

DPSS concedes its ICWA notice did not comply with federal and state law because it failed to include mother's date and place of birth, the addresses of mother's prior residences, or any information about N.B.'s maternal grandparents and great-grandparents. (25 C.F.R. § 23.11(a), (d)(1) (2015); Welf. & Inst. Code, § 224.2, subd. (a)(5)(C); *In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 575, fn. 3 [Fourth Dist., Div. Two].) Moreover, contrary to the assertion made in the respondent's brief, DPSS had a duty under state law to transmit a copy of N.B.'s birth certificate, assuming it was available. (Welf. & Inst. Code, § 224.2, subd. (a)(5)(E).)

Notwithstanding its omissions, DPSS contends the error was harmless because, even if the missing information was included in the notice, N.B. would not have been found to be an Indian child. "[A] notice violation under ICWA is not jurisdictional in the fundamental sense, but instead is subject to a harmless error analysis. [Citations.]" (*In re G.L.* (2009) 177 Cal.App.4th 683, 695-696.) "An appellant seeking reversal for lack of proper ICWA notice must show a reasonable probability that he or she would have obtained a more favorable result in the absence of the error. [Citations.]" (*Id.* at p. 696.)

We conclude the error was not harmless. The courts have found deficiencies in ICWA notice harmless "when it [could] be said that, if proper notice had been given, the child would not have been found to be an Indian child and the ICWA would not have applied. [Citations.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1530.) The same cannot be said here. In their ICWA responses, the Blackfeet Tribe, the Eastern Band of

Cherokee Indians, and the Cherokee Nation stated they could not locate *N.B.*'s name or her *parents*' names in their enrollment records. This is unsurprising considering mother never claimed that she was an enrolled member of an Indian tribe, and father denied any Indian heritage. But even if we were to assume DPSS provided sufficient information regarding N.B. and mother, failure to provide any information whatsoever about N.B.'s maternal grandparents and great-grandparents casts serious doubt about the effectiveness of the notice. We cannot say with any certainty that a search of the enrollment records for N.B.'s maternal grandparents and great-grandparents would have resulted in the same conclusion that N.B. is not an Indian child.

Because we conclude omissions in the ICWA notice are not harmless, we remand for the limited purpose of providing additional notice pursuant to ICWA. DPSS shall exercise due diligence to obtain the omitted information and shall resubmit notice to the identified Indian tribes. The juvenile court shall then determine anew whether the new ICWA notice contains meaningful information from which the identified Indian tribes may determine whether N.B. is an Indian child.

III.

DISPOSITION

The order terminating mother's parental rights is conditionally reversed and the matter is remanded for the limited purpose of directing the juvenile court to order DPSS to comply with the notice provisions of ICWA and to file all required documentation with the juvenile court for its inspection. If, after proper notice, a tribe claims N.B. is an Indian child, the juvenile court shall proceed in conformity with all provisions of ICWA.

And, N.B., mother, and an Indian tribe claiming N.B. is an Indian child, may petition the juvenile court to invalidate any orders that may have violated ICWA.

If, on the other hand, no tribe makes such claim, prior defective notice becomes harmless error, and the order terminating mother's parental rights shall be reinstated.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P. J.

We concur:

KING
J.

MILLER
J.